No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of Scandinavian-American Building Company, a corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al, *Appellees*,

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BEN OLSON COMPANY, a Corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, et al, *Appellees*,

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Brief of Ben Olson Company, Appellant, Answering the Briefs of J. P. Duke, Supervisor et al, and Forbes P. Haskell, Jr., Receiver, on the Subject of Appellant's Waiver of its Lien

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Statement

When successful bidders on this work were presented formal contracts for execution they found

therein Paragraph XIV (Rec. p. 316), which read as follows:

> "Art. XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim for lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract."

One and all they objected and refused to execute with that clause in the contract, and with those who could not be persuaded to accept, the clause was entirely omitted.

The McClintic-Marshall steel contract, the largest contract of all, and the first one entered into, did not contain it; and there were several others.

But others, Tacoma Millwork Supply Company; E. E. Davis & Co.; Edward Miller Cornice & Roofing Co.; Ben Olson Company, and perhaps still others, were persuaded to let the clause remain.

This persuasion was accomplished by the making of five false statements by Larson, President of the Bank, and Drury, President of the Building Company, aided by Webber the Architect and G. Wallace Simpson, the nominal mortgagee, as follows:

1. That a completion loan by mortgage had been arranged for in the sum of $600,000.

2. That the loan could not be procured unless

all contractors waived the right of lien.

3. That all contracts already made contained the waiver clause.

4. That all other contractors would be required to accept the waiver clause.

5. That there was cash on hand for interim construction expenses.

These statements were all false, in this:

First: No $600,000, loan had been arranged for, in any final sense. The Metropolitan Life Insurance Company's so-called "Commitment" was merely tentative, and not binding on anybody. (Rec. p. 981-5, Ex. 177).

Second: The condition made by the Metropolitan Life Insurance Company did not require a general lien waiver at all. The clause referring to this matter is on page 984 of the record, and reads:

> "Contracts entered into for the construction of the building should contain a clause *subordinating the contractor's right of lien to the lien of our mortgage.*"

This "Commitment" had been in the possession of the Bank and Building Company since Nov. 7, 1919, the representations being made in February afterward; and on February 10, 1920, it was before the Bank's Board of Directors when it passed its resolutions covering the transfer of Lots 11 and 12 to the Building Company, wherein it

recited that it would be necessary that the first mortgage of $600,000, be executed and recorded—

> "before any work or construction of the building shall commence and *before any contract shall have been let for the erection or construction of said building.*" (Rec. p. 1008; Ex. 181).

The Receiver's Brief p. 6 and Duke's p. 15, refer to the "Commitment", Ex. 177, and quote its language as above set forth as the justification for the waiver clause in the contracts.

Thus, the demand of the Metropolitan Company was only that contracts be *subordinated to its mortgage*, not that contractors waive all their lien rights. The mortgage was, in fact, not executed and recorded until March 10th, (Rec. p. 136, Ex. Y) long after every contract we know of had been executed; but it was recorded before any contractor had commenced work on the building and its presence on the public records was sufficient to subordinate any liens for such work to its provisions, if it had ever become of any effect. Therefore there was no necessity for any waiver clause in the contract.

Third: It was not true that all contracts theretofore entered into contained a waiver clause. Several contractors had peremptorily refused, and the clause had been erased from their contracts. Notably was this true in the cases of McClintic-Marshall Company, the largest contractor of all, covering some $263,000 worth of material (Rec. p.

31) which contract was made February 5th.

Fourth: Neither was it true that it was the intention to exact the waiver clause from all contractors. This appellant's contract was signed February 27th, but on the next day two equally important ones were executed, viz: Far West Clay Company for $29,000 and Washington Brick, Lime & Sewer Company for $99,000, (Rec. pp. 535 and 270) without the clause. And there must have been several others.

Fifth: There was no cash on hand and absolutely no resource for any; and it was entirely concealed from contractors that it had been arranged for the Building Company to execute a second mortgage for $750,000, of which the Bank would take $350,000 for purchase price of lots.

Estoppel Against Assertion of Waiver

There are several ways of presenting such a state of facts in such a case. This appellant chose that of estoppel, pleaded the facts in its cross-complaint (Par. XXVII, Rec. p. 305), and claimed estoppel of the owners to assert the waiver.

Argument

The principles of estoppel by misrepresentation are well understood; and preliminarily the right to invoke such an estoppel in such a case does not depend upon fraud at all.

The elements for an estoppel are all present here. There were false representations, with actual knowledge of the facts; appellant had no means of knowing the facts; the statements were made for the purpose of persuading appellant to act on them; appellant relied upon and acted upon them exceedingly to its prejudice, if the waiver be sustained, for it led directly to its loss of the valuable right given it by statute; and to place it at a disadvantage with other contractors.

We know of no better resume of the subject than that found in 16 Cyc., commencing on page 722 to 746.

The testimony about these representations was overwhelming, and the Court below held with all the contractors on that point.

Estoppel is approved in cases of Building Contracts and Mechanic's liens.

10 Ruling Case Law p. 804.

This authority cites *Wetzel etc. R. Co. vs. Tennis Bros. Co.*, 145 Fed. 458; 75 C. C. A. 266, which is closely in point here, for it was a case where the owner stopped the contractor's work and claimed that he had lost his right to a lien, by agreeing to accept part of his compensation in certain bonds; and it was held that estoppel lay by reason of the interference. And a closely analogous case is that of *Murray vs. Brown*, 91 U. S. 257, where, on pages 265-6, the Court sustained the contractor's

right to his lien when the owner had refused to convey land which was to be his sole compensation.

In a Washington case, *Pacific Lumber etc. Co. vs. Dailey,* 60 Wash. 566, the contractor had agreed to accept as security a deed of land subject to a mortgage for $1,200; but when settling time came it appeared that there were three other mortgages agregating $1661. on the land, and it was held that the lien attached.

Something has been said in the briefs which we are answering, on the subject of entire contracts; but if our theory of estoppel is correct the matter of entirety can have no bearing, for if the owner is estopped to assert the waiver, it is as though that clause were not in the contract at all. As we said in our open brief, however, we are proceeding on the Statute and not upon any theory of damages or *quantum meruit.*

Other Claimants

This brief is intended to answer the owners who, only, have any right to urge the waiver proposition. Some other lien claimants may seek to argue this matter; but they are not interested.

In the first place, the waiver was not for their benefit, they knew nothing of its existence, until this action was commenced, they never acted upon it, and they were not in privity with it.

Secondly, the claim of this appellant, being that of a contractor, the lowest in the rank of liens, those claimants whose claims are for labor or materials, only, cannot be affected one way or another, whether the waiver clause stands or not.

Seattle Lumber Company vs. Cutler, 63 Wash. 662.

To avoid duplication, we beg to refer the Court for further argument on this question to the brief of Messrs. Flick and Paul in behalf of the Tacoma Millwork Supply Company, pp. 75-82.

Respectfully submitted,

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